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# Commentary

## Segmented Rankings For Segmented Markets

RAFAEL GELY\*

### INTRODUCTION

A joke frequently told by and about economists begins with a group of colleagues searching one night under a lamppost for a key in a gutter. A bystander asks the group where they have lost the key. The economists explain that although they had lost the key in a gutter some distance away, they were looking under the lamppost because the light was better there.<sup>1</sup> The three articles in this panel remind me of this story, albeit in a non-conventional way. By exploring issues regarding the broader context in which rankings exist, the three articles encourage us to look not at rankings themselves but at the world around them. In that way, the articles provide new and important insights about rankings and the market for legal education.

Using the three articles as a foundation, I argue that the underlying problem with the existing rankings regime is the assumption that law schools compete in a single, unified market, and that it is thus appropriate to impose a national ranking on all the schools. I propose that a segmented rankings system, one that is more consistent with the way the market for legal education actually functions, will better serve the relevant constituencies. In Part I, I briefly summarize the key insights of the three articles. Part II describes my proposal.

### I. MAJOR INSIGHTS

Let me start first with the articles' major contributions. In *The Rat Race as an Information-Forcing Device*,<sup>2</sup> Professors Scott Baker, Stephen J. Choi, and Mitu Gulati propose that rankings can be understood as an information-forcing device, what they refer to as a "revelation tournament."<sup>3</sup> A revelation tournament has two stages. In stage one, "candidates" compete based on some "objective, easily observable criteria."<sup>4</sup> In stage two, the decision makers evaluate the winners of stage one based not only on the objective criteria, but on some other "hard-to-observe" subjective information that came to light during the first stage of the tournament. The authors then

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1. Hussein Kassim & Catherine Waddams Price, *Principal Agent Relationships and UK Regulated Utilities*, 76 ANNALS PUB. & COOPERATIVE ECON. 1 (2005).

2. Scott Baker, Stephen J. Choi & Mitu Gulati, *The Rat Race as an Information Forcing Device*, 81 IND. L. J. 53 (2006).

3. The authors have developed their tournament's framework in some prior work. See Stephen Choi & Mitu Gulati, *A Tournament of Judges?*, 92 CAL L. REV. 299 (2004); Stephen Choi & Mitu Gulati, *Choosing the Next Supreme Court Justice: An Empirical Ranking of Judge Performance*, 78 S. CAL. L. REV. 23 (2004).

4. See Baker et al., *supra* note 2, at 62.

apply their tournament model to two employment-related settings (partner decisions at law firms and tenure decisions at law schools), a political appointments process (appointment of Supreme Court justices), and to law school rankings.

As Professors Baker, Choi, and Gulati note, their article makes both positive and normative contributions to our understanding of incentive structures in a variety of promotion situations and even in the rankings contexts. In particular, the article helps explain the apparent puzzle as to why promotion decisions in so many employment settings are based on criteria that appear to be less important and seemingly unrelated to the actual goals of the specific jobs. The answer provided by Professors Baker, Choi, and Gulati is that the seemingly unrelated—yet objective and easily verifiable information—provided early in the tournament serves first to screen out some candidates, but, more importantly, forces the revelation of other information. That other information—information which is subjective and much more difficult to obtain—is the kind of information the decision makers truly need to make promotion decisions.

I was particularly interested in the choice of language used by the authors. Notice the authors' use of the term "revelation" instead of the term "revealing." This distinction is important, I think. "Revelation" can be defined as "an enlightening or astonishing disclosure",<sup>5</sup> implying that neither party knows about the true state of affairs of what has just been revealed. On the other hand, "to reveal" is defined as "to make something secret or hidden publicly or generally known" or "to open up to view."<sup>6</sup> Thus, "revealing" is suggestive of a situation in which the party doing the revealing knows about the state of affairs of what he or she is about to disclose.<sup>7</sup> If my understanding of a revelation tournament is accurate, a tournament then creates a situation in which the decision maker is not the only one learning some new information about the candidate, but the candidate is learning some new information as well.

Herein is the major insight I gained from this paper. A rankings system might force law schools to reveal information that they know, but, more importantly, might also serve as a sort of "revelation" for law schools. To the extent that the same forces that operate in revelation tournaments were to operate in the rankings world, rankings might help law schools to understand themselves better as well as gain a better perspective of their place and role in the marketplace.

I should point out that Professors Baker, Choi, and Gulati might not share my perspective in this regard, since they conclude their article with a much-guarded view of the effectiveness of rankings as a revelation tournament. In particular, the authors note that rankings might not serve as effective revelation tournaments for at least two reasons. First, they argue that, unlike the situation in most employment settings, law school rankings might not produce any "subjective, otherwise hard-to-obtain information."<sup>8</sup> The authors are also concerned that the diffuse nature of the decision

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5. A. Merriam-Webster, *NEW COLLEGIATE DICTIONARY* (1975).

6. *Id.*

7. Professors Baker, Choi, and Gulati note that some of the information involved in tournaments is information not known to the candidate. I will suggest that even if the candidate knows that he or she possesses a given characteristic such as honesty, the candidate may not know whether he or she will behave honestly in certain conditions.

8. Baker et al., *supra* note 2, at 80.

makers in the law school rankings context creates a collective action problem which makes whatever information is generated in stage one of the tournament rather useless.

Professors Michael Sauder and Wendy Espeland begin their article, *Strength In Numbers? The Advantages of Multiple Rankings*, with the somber assessment that we live in what they describe as an "audit culture."<sup>9</sup> Thus, they remind us that rankings are here to stay, and that it is important to evaluate the consequences of rankings and to "devise strategies for mitigating their most damaging effects."<sup>10</sup>

Professors Sauder and Espeland argue that in the law school world, the problems associated with rankings are aggravated by the fact that there is one dominant rankings system: *U.S. News & World Report* ("*U.S. News*"). In particular, they identify three problems with a single-ranker system: small changes and small differences gain disproportionate importance;<sup>11</sup> loss of reputational control;<sup>12</sup> and uncritical use of rankings by consumers.<sup>13</sup>

Contrary to the situation in law schools, Professors Sauder and Espeland note that in business schools none of these three problems are as severe. The difference, they argue, is that unlike the situation in the law school context, there are at least six highly influential business school rankings and several others that receive considerable attention.<sup>14</sup> The existence of multiple rankings, each one defining educational quality in a different way, reduces the magnitude of the effect of the three problems associated with a dominant-ranker system. In particular, multiple rankings create "an ambiguous signal about where schools stand in relation to one another" while still providing some useful information.<sup>15</sup> For example, multiple rankings diminish the concerns regarding lack of control over the reputation of a school. According to the authors, multiple rankings allow business school administrators to explain away bad performance in one ranking by pointing out possible improvements in alternative rankings.<sup>16</sup>

Professors Sauder and Espeland argue that, given that rankings are here to stay, the best solution to the single-ranker problem presented by *U.S. News*'s dominance in the law school context is the proliferation of alternative, competing rankings.<sup>17</sup> As with business schools, multiple rankings will help to minimize the problems associated with a single-ranker system.

The argument developed by Professors Sauder and Espeland is based on two underlying assumptions. First, the authors correctly assume that multiple rankings provide some useful information about the quality of the service provided by the educational institution; that is, rankings create ambiguity because they create difference metrics, not because they create noise. This is not to say, of course, that rankings are

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9. Michael Sauder & Wendy Nelson Espeland, *Strength in Numbers? The Advantages of Multiple Rankings*, 81 IND. L. J. 205, 206 (2006).

10. *Id.*

11. *See id.* at 212-213.

12. *See id.* at 214-215.

13. This problem occurs when the various constituencies the law school serves treat the rankings "like the bible" or as if they were "written in stone." *Id.* at 216.

14. *See id.* at 218.

15. *Id.* at 219.

16. *See id.* at 222 (discussing how a dean of a business school responded to unfavorable rankings in one publication by pointing out favorable rankings in other publications).

17. *See id.* at 207.

perfect, and that there are not problems with most, if not all, ranking methodologies. The point is that rankings create different ways of measuring quality, and that the consumers of rankings might find that information useful. If this argument is correct, then the current single-ranker system is having a negative effect on the production and flow of information. Multiple rankings might not only alleviate the problems that law schools face because of one dominant ranker, but will have the added effect of increasing the amount, and perhaps the quality, of information available in the legal education market. Second, the argument developed by Professors Sauder and Espeland also appears to be based on the proposition that it will be counterproductive to force a "market" as varied and rich in information as the business schools market, and similarly the law schools market, to a single-ranker system. By forcing such a market to a system with a dominant ranker, we will be losing valuable information and consequently not serving the informational needs of consumers.

Finally, in *Student Quality as Measured by LSAT Scores: Migration Patterns in the U.S. News Rankings Era*, Professors William D. Henderson and Andrew P. Morriss develop, as far as I know, the first model of a market for high-Law School Admission Test (LSAT) students.<sup>18</sup> The authors seek to identify the factors that help explain why some law schools have been able to increase their LSAT medians since 1992 while others have not. In addition to every published input variable from *U.S. News* since 1992 (e.g., Median LSAT, Academic Reputation, and Percentile Rank), the authors include a number of variables believed to be relevant to the market for high-LSAT students. Some of these variables are the conditions in the relevant labor market, characteristics of the law schools that may influence their ability to respond to market changes, and characteristics of the relevant legal education market.

The authors provide a list of six results, which I think are best summarized by their first result, that there is a "[c]lear [d]ifference in the [m]arket for [s]tudents [b]etween 'Tier 1' [top 50 schools] and the [r]est of the [l]aw [s]chool [w]orld."<sup>19</sup> Professors Henderson and Morriss thus make clear what I argue, as well as what was alluded to in the article by Professors Sauder and Espeland: there is segmentation in the market for legal education.

## II. A BRIEF PROPOSAL

My brief proposal is based on this very idea of market segmentation, and incorporates insights from each of these three fascinating articles. Let me first define the problem: *U.S. News* has treated the legal education market as one big, unified, single market. On the suppliers' side, all law schools have been treated as competing against each other in the delivery of legal education. On the consumers' side, students and law firms have been treated as interested in buying from each of the suppliers. I would like to suggest that the legal education market is a segmented market.

As Professors Henderson and Morriss find, there are clear differences between the markets faced by top tier and non-top tier schools. Their finding implies that law

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18. William D. Henderson & Andrew P. Morriss, *Student Quality as Measured by LSAT Scores: Migration Patterns in the U.S. News Rankings Era*, 81 IND. L. J. 163 (2006).

19. *Id.* at 182.

schools, at least in these two broad segments, are not competing with each other; instead, law schools are competing in some narrower, identifiable segments.

Similarly, on the consumer side, I think that students do not come into the market willing and able to buy from any supplier, but that they have narrowed their options substantially. Applicants to law school (whether with high or low LSAT scores) do not apply to every law school to which they have a good opportunity to get in. This suggests that to the extent students use rankings to somehow process all the information that is out there regarding law schools, applicants do not need, or want to, know about every law school, but about a somewhat smaller set of schools.

If the above is correct, a ranking system that creates appropriate market segments, and then ranks schools in that segment, might serve both the interests of producers and consumers and improve over existing methodologies. In fact, in its undergraduate ranking system, *U.S. News* recognizes this idea of segmentation. Using a classification system developed by the Carnegie Foundation for the Advancement of Teaching,<sup>20</sup> they place universities in four distinct groups: National Universities,<sup>21</sup> Liberal Arts Colleges,<sup>22</sup> Universities–Masters,<sup>23</sup> and Comprehensive Colleges–Bachelors.<sup>24</sup>

The first step toward the implementation of this proposal is to identify the potential basis to segment the market. There is extensive academic literature on marketing which describes the basis for identifying market segments.<sup>25</sup> In general, market segments should be measurable, accessible, substantial, and have unique needs and durability.<sup>26</sup> According to one scheme, markets could be segmented according to geography, demographics, psychographics (segmentation based on customer lifestyle), and behavior (segmentation based on customer behavior towards products).<sup>27</sup>

In the context of legal education there are a variety of options. Professors Henderson and Morriss have, of course, identified the divide between “Tier 1” and the

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20. Lee S. Shulman, *Foreword* to THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, CARNEGIE CLASSIFICATION OF INSTITUTIONS OF HIGHER EDUCATION, at vii (2000), available at <http://www.carnegiefoundation.org/Classification/CIHE2000/foreword.htm> (“The Classification has been widely used for unintended purposes as well, some benign and others not. *U.S. News & World Report* uses the Classification to organize its influential college rankings.”).

21. These are institutions that “offer a full range of undergraduate majors, as well as master’s and doctoral degrees; many strongly emphasize research.” *Ranking Category Definitions*, in AMERICA’S BEST GRADUATE SCHOOLS 2006 (2005), [http://www.usnews.com/usnews/edu/college/rankings/about/cornkdfs\\_brief.php](http://www.usnews.com/usnews/edu/college/rankings/about/cornkdfs_brief.php).

22. These are institutions that “emphasize undergraduate education and award at least 50 percent of their degrees in the liberal arts.” *Id.*

23. These are institutions that “provide a full range of undergraduate programs and some master’s level programs” but “offer few, if any, doctoral programs.” *Id.*

24. These are institutions that focus primarily on undergraduate education, but degrees in liberal arts disciplines constitute less than 50 % of the degrees awarded and they offer a range of degree programs in professional fields such as business, nursing, and education. *Id.*

25. See generally Yoram Wind, *Issues and Advances in Segmentation Research*, 15 J. MARKETING RES. 317 (1978) (summarizing segmentation research).

26. See Netmba.com, Market Segmentation, [www.netmba.com/marketing/market/segmentation/](http://www.netmba.com/marketing/market/segmentation/) (last visited August 1, 2005) (describing the basis for market segmentation analysis).

27. *Id.*

rest of the law school world as one possible basis for segmenting the market.<sup>28</sup> In the alternative, and following up on Professor Sunstein's idea of relying on student choices (revealed preferences), one could let the students identify the relevant segments.<sup>29</sup> The Law School Admissions Council (LSAC) provides law schools with information about what they refer to as overlap deposits.<sup>30</sup> Law schools participating in this service receive from the LSAC information on the number of admitted applicants who have paid deposits to the participating school as well as other schools. The report identifies the other school, although it does not identify the individual students. For example, as the summer comes to a close we will know at Cincinnati how many of our approximately 140–150 possible admitted students have paid deposits only at our school, and how many have paid multiple deposits. Over the years, fairly clear patterns emerge regarding the schools with which tend to appear in that list. Our list tends to include several of the other Ohio law schools, some of the major law schools in the Midwest, and a few other schools across the country. This information, I argue, could reflect what students consider to be cohorts of schools that they consider to represent relevant markets. These cohorts could become the basis of market segments which then could be subject to some form of ranking.

Yet another possible way of segmenting the market could be based on a combination of “national” and “regional” segments. It is clear that there are some law schools with constituency groups (students, law firms, alumni, etc.) that operate at a national level. They draw applicants from all over the country, and perhaps from all over the world. They place students in jobs nationally and internationally. Other law schools serve markets that can be characterized in more regional or perhaps local terms. It seems rather strained to force schools at these two very opposite ends of the geographic placement spectrum into one ranking system.

One possible solution would be to allow schools to sort themselves into one “national” and several “regional” rankings, where the “regional” rankings will match the school against more relevant competitors in the various categories. Of course, it is possible that none of the schools will choose to be in the regional rankings, preferring instead to compete in the national rankings. Although this is possible, I think that there might be forces operating in the opposite direction. Professors Baker, Choi and Gulati's notion of a revelation tournament suggests that rankings can serve as a way for a law school to find out more about itself as it reveals information to the public. By, for example, giving schools the option to opt out of a national ranking and participate in a different segment ranking, the school will be forced to think carefully about what constituency it serves, what it sees as its main mission, and how it wants to be perceived in the relevant community.

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28. Henderson & Morriss, *supra* note 18, at 182.

29. See Cass R. Sunstein, *Ranking Law Schools: A Market Test?*, 81 IND. L. J. 25 (2006).

30. Interview with Al Watson, Assistant Dean of Admissions, University of Cincinnati College of Law, in Cincinnati, Ohio (Mar. 2005).